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Supreme Court, U.S.
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No. 04-340

IN THE

Supreme Court of the United States

SAN REMO HOTEL L.P., *et al.*,
Petitioners,
v.
CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, CHAMBER OF COMMERCE OF THE UNITED STATES, ALLIED EDUCATIONAL FOUNDATION, AMERICAN ASSOCIATION OF SMALL PROPERTY OWNERS, NATIONAL TAXPAYERS UNION, ANTHONY PALAZZOLO, PROPERTY RIGHTS FOUNDATION OF AMERICA, SOUTH CAROLINA LANDOWNERS ASSOCIATION, SMALL PROPERTY OWNERS ASSOCIATION, SMALL PROPERTY OWNERS OF SAN FRANCISCO INST., AND UNITED LOT OWNERS OF CAMBRIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici curiae address only the first question presented by the Petition:

Did the U.S. Court of Appeals for the Ninth Circuit err in holding, contrary to a holding of the U.S. Court of Appeals for the Second Circuit, that issue preclusion bars consideration of a claim under the Fifth Amendment's Takings Clause where: (1) a state court has rejected the plaintiffs' analogous state-law cause of action; and (2) the plaintiffs filed their state court action for the sole purpose of ripening their Takings Clause claim, as required by this Court's decision in *Williamson County Planning Comm'n v. Hamilton Bank of Johnson City*?

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INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* are set forth in the appendix to this brief.[1]

STATEMENT OF THE CASE

Petitioners are the owners of a building located in San Francisco (the San Remo Hotel) that has been operated as a tourist hotel since the 1950s. The record is uncontested that in the decades preceding this litigation, the great majority of the Hotel's 62 rooms were rented primarily to tourists, while about 10 of the rooms were rented on a longer-term basis to residential tenants.

The City of San Francisco adopted ordinances in 1981 and 1990 (the "Hotel Ordinance") that sought to induce hotel owners to reserve units for residential tenants, in order to prevent deterioration of the residential housing stock. San Francisco officials informed Petitioners that, pursuant to the 1990 Hotel Ordinance and related zoning laws, they were no longer permitted to rent *any* of their 62 units to tourists without first obtaining a "conditional use permit."[2] Because that determination threatened the destruction of their tourist hotel business, Petitioners in 1990 applied for a permit that would

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief. Letters of consent to this filing have been lodged with the Court.

[2] The California Supreme Court later determined, as a matter of state law, that San Francisco had erred in this respect. That court determined that tourist use of the Hotel's rooms was a "permitted conditional use" -- and thus Petitioners did not need a permit to continue to rent to tourists at historic levels. Pet. App. 124a-127a & n.10.

allow them to rent all 62 units to tourists. In 1993, the San Francisco Planning Commission granted the requested permit, conditioned on Petitioners' payment of $567,000 -- supposedly to compensate San Francisco for the loss of residential units occasioned by the grant of the permit. Petitioners paid the exaction under protest.

San Remo I. Petitioners' 1993 federal court complaint challenged San Francisco's imposition of a $567,000 exaction on several grounds, including that it violated the Fifth Amendment's Takings Clause, both on its face and as applied. Following the district court's 1996 grant of summary judgment to Respondents on all claims, Petitioners appealed. The Ninth Circuit affirmed dismissal of the as-applied takings claim, citing *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), as authority for its finding that the claim was unripe -- because Petitioners had not yet sought "just compensation" from the California courts for the alleged taking. *San Remo Hotel v. City and County of San Francisco*, 143 F.3d 1095, 1102 (9th Cir. 1998) ("*San Remo I*"). The court also deemed the facial challenge unripe to the extent that it alleged that San Francisco's actions denied Petitioners all economically viable use of their property. *Id.* The court acknowledged that the facial challenge *was* ripe to the extent that it alleged that the 1990 Hotel Ordinance did not substantially advance legitimate state interests, but it invoked *Pullman* abstention[3] to defer consideration of that claim until after analogous state-law issues could be considered by state courts.

San Remo II. Petitioners filed an inverse condemnation claim in state court, arguing that article 1, section 19 of the

[3] *See Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941).

California Constitution required San Francisco to provide compensation for the $567,000 confiscated from them. Petitioners did *not* raise any federal claims in this state-court action; indeed, they specifically reserved claims under the Takings Clause until their expected return to federal court, citing *England v. Louisiana State Bd. of Medical Advisors*, 375 U.S. 411 (1964).

The California Court of Appeal reversed the trial court's grant of San Francisco's demurrer to the state constitutional claims. In March 2002, the California Supreme Court voted 4-3 to reverse the court of appeal and sustain the demurrer. Pet. App. 106a-194a ("*San Remo II*"). The court stated that San Francisco had erred in informing Petitioners that they would need to obtain a "conditional use permit" if they wished to continue renting any of their 62 rooms to tourists. *Id.* at 124a-127a & n.10. The court nonetheless held that that error did not affect the state constitutional issue because Petitioners ultimately applied for a permit to rent *all* of their units to tourists, not simply to rent to tourists at historic levels. *Id.* at 122a-130a. Because *some* units had been rented to residential tenants during the preceding decades, the court explained, Petitioners were properly required under state and local law to seek a permit if they wished to cease renting to residential tenants. *Id.*

The court next determined that for purposes of Petitioners' state constitutional claim, the $567,000 exaction should be not be subject to "heightened scrutiny." *Id.* at 130a-144a. The court had held in *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996), that the monetary exaction imposed in that case should be subject to "heightened scrutiny" under the state

constitution.[4] But the court held that *Ehrlich*'s heightened scrutiny standard applies only when an exaction is imposed on an *ad hoc* basis by a government administrator to whom discretionary powers have been delegated. When the exaction is imposed pursuant to a legislative mandate that applies "without discretion or discrimination" to an entire class of property owners, there is no reason to apply *Ehrlich*'s heightened scrutiny, the court held. *Id.* at 137a-138a. The court instead applied "the more deferential constitutional scrutiny applicable to land use regulations made generally applicable by legislative enactment to a class of property owners." *Id.* at 137a.

Applying that deferential scrutiny, the court held that the Hotel Ordinance did not violate the state constitution, either on its face or as applied to Petitioners (in the form of a $567,000 exaction). *Id.* at 144a-155a. The court held that the housing replacement fees imposed by the Hotel Ordinance "bear a reasonable relationship" to the loss of residential housing when residential units are taken off the market and thus were not facially invalid. *Id.* at 144a. The court also held that the $567,000 exaction imposed on Petitioners bore a reasonable relationship to the loss of residential units as a result of conversion of the San Remo Hotel to an entirely tourist hotel. *Id.* at 152a-155a.

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[4] The court said that the "heightened scrutiny" it imposed in *Ehrlich* was similar to the level of scrutiny mandated by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), in cases in which a government conditions approval of a development permit on a landowner's agreement to dedicate a portion of his property to the government. *Id.* at 134a-137a. In *Nollan/Dolan*, the Court held that such conditions violate the Fifth Amendment's Takings Clause unless there is a "rough proportionality" between the exaction and the projected impact of the proposed development. *Dolan*, 512 U.S. at 386.

Justices Baxter, Chin, and Brown dissented. Justices Baxter and Chin argued that Petitioners should not have been required to pay an exaction based on the conversion of all 62 rooms to tourist use when (as all members of the court agreed) Petitioners had adequately alleged a right under state law to use as many as 53 of the 62 rooms for tourist rentals without obtaining a conditional use permit. *Id.* at 155a-174a. Justice Brown argued that the Hotel Ordinance was facially unconstitutional and thus that the entire $567,000 exaction constituted a taking in violation of the state constitution. *Id.* at 175a-194a. She argued that Petitioners did not cause, and thus are under no obligation to use their property to alleviate, San Francisco's low-income housing shortage. *Id.* at 177a. She argued that the costs of alleviating that shortage should properly be borne by all citizens rather than by a small group not responsible for its creation. *Id.* at 176a-177a.

All seven justices were in agreement that Petitioners had not raised, and that the court had not addressed, any federal constitutional issues. *Id.* at 107a n.1 (majority opinion) ("No federal question has been presented or decided in this case."); *id.* at 170a (Baxter, J., dissenting) ("Plaintiffs have reserved their federal claims and, if rebuffed here, will resume their federal litigation which is now subject to *Pullman* abstention."); *id.* at 194a (Brown, J., dissenting) ("I dissent and hope the plaintiffs find a more receptive forum in the federal courts."). None of the justices gave any indication that they thought that California law governing claim and/or issue preclusion would bar Petitioners from fully litigating their Takings Clause claim in federal court.

San Remo III. Petitioners then returned to federal court with their Takings Clause claims. In orders issued in October 2002 and April 2003, the district court granted San Francisco's motion to dismiss the complaint under Fed.R.Civ.P. 12(b)(6).

It held that: (1) the facial challenges to the Hotel Ordinance and San Francisco zoning law were time barred; and (2) all of Petitioners' claims had already been rejected by the California Supreme Court and thus were barred by the doctrine of issue preclusion. *Id.* at 53a-105a; 22a-52a.

The Ninth Circuit affirmed, finding that issue preclusion required dismissal. *Id.* at 3a-21a ("*San Remo III*").[5] The court held that although Petitioners' *England* reservation "was sufficient to avoid the doctrine of *claim* preclusion," such a reservation "does not enable them to avoid preclusion of issues actually litigated in the state forum." *Id.* at 13a, 14a. Relying on its prior decisions, the court held that issue preclusion bars litigation of a Takings Clause claim in federal court after the property owner has litigated and lost a state-law takings claim in state court, "if the state courts would give preclusive effect to the judgment of the state court and the state and federal substantive law of takings are equivalent." *Id.* at 16a.[6]

The appeals court then undertook a comparison of the California Supreme Court's interpretation of the state constitution's takings provision with the Ninth Circuit's interpretation of the Takings Clause. *Id.* at 17a-20a. Finding

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[5] The court "express[ed] no opinion on [the district court's] alternate holding regarding the statute of limitations." *Id.* at 11a.

[6] The court recognized that its holding conflicted with a Second Circuit decision on this point. *Id.* at 14a-15a (citing *Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003)). Although recognizing that *Santini* had "held that a plaintiff who must proceed to state court to ripen his takings claim under *Williamson County* should not then be precluded" from raising a Takings Clause claim in federal court, "so long as the plaintiff reserved his claim under *England*," the court held that it was bound by circuit precedent to reject *Santini*'s approach. *Id.* at 15a.

that the California Supreme Court's analysis was "equivalent to the approach taken in this circuit" -- particularly with respect to the *Nollan/Dolan* "rough proportionality" test -- the Ninth Circuit held that Petitioners' Takings Clause claims "are barred from litigation under the doctrine of issue preclusion." *Id.* at 19a, 21a.

REASONS FOR GRANTING THE PETITION

This case raises property rights issues of exceptional importance. Petitioners contend that San Francisco violated their rights under the Fifth Amendment's Takings Clause by taking $567,000 from them without providing just compensation. After 11 years of attempting to litigate that claim in federal court, Petitioners have now been told by the Ninth Circuit that they will never be permitted to do so *in any court*. The Ninth Circuit held that the doctrine of issue preclusion bars Petitioners from litigating their claim in federal court, even though the issues raised by their Takings Clause claim have not been adjudicated by any other court.

The Ninth Circuit decision is an unprecedented expansion of the issue preclusion doctrine, unwarranted by either this Court's precedents or common law understandings of that doctrine. Moreover, the decision threatens to undermine the ability of Takings Clause claimants ever to have their day in court. As the Petition well illustrates, the Ninth Circuit decision -- when read in conjunction with this Court's decision in *Williamson County* -- creates a trap that will ensnare even the most wary of claimants. *Williamson County* held that a Takings Clause claim is not ripe until a property owner has sought, and been denied, compensation from a state court pursuant to state-law remedies. But according to the Ninth Circuit, the very event that this Court viewed as a condition precedent to bringing a Takings Clause claim -- the

rejection of compensation claims by a state court -- serves to bar a property owner from ever raising his Takings Clause claim in federal court, regardless whether (as here) he explicitly reserves his right to press his federal claims in subsequent federal proceedings. Indeed, in the many states (such as California) that will not permit Takings Clause claims to be raised in state court until after state-law compensation claims have been denied, the Ninth Circuit ruling prevents property owners from raising Takings Clause claims in *any* court, whether state or federal.

As the Ninth Circuit recognized, its decision directly conflicts with a decision of the Second Circuit. Pet. App. 14a-15a. That conflict alone provides ample reason to grant the Petition. Moreover, review in this case is particularly warranted because the decision below threatens to undermine the ability of citizens to vindicate their Fifth Amendment rights. *Amici* do not mean to suggest that issue preclusion can never have any application in Takings Clause cases; but the unprecedented and sweeping manner in which the Ninth Circuit has applied that doctrine in this case cries out for review by this Court.

Petitioners seek review on a second issue as well: whether the Ninth Circuit erred in finding that exactions imposed on a property owner as a condition for receipt of a development permit are subject to more deferential review when imposed pursuant to a legislative rule rather than pursuant to an *ad hoc* administrative decision. Although this brief does not address that second issue, *amici* fully agree with Petitioners both that review of the issue is warranted and that the Ninth Circuit erred in applying a deferential standard of review. In any event, if the Court determines that review of the second issue is not warranted at this time, that

determination would in no way lessen the appropriateness and urgency of granting review on the first issue.

Finally, review is warranted because the Ninth Circuit's decision is so clearly at odds with this Court's precedents. Those precedents indicate that issue preclusion serves to bar litigation of an issue only when the *precise* issue has already been decided in a prior proceeding. Yet, there is no dispute that none of the issues raised by Petitioners in their federal court proceedings were ever precisely raised or decided by the California courts. The Ninth Circuit held merely that the California Supreme Court's determination of the state takings claims was "an equivalent determination" of Petitioners' federal Takings Clause claims. Pet. App. 17a. There is no basis under state or federal law for precluding review of a federal issue simply because a previously decided state law issue is deemed in some sense to be "equivalent."

Nor would such a doctrine serve the purposes of the issue preclusion doctrine. That judge-made doctrine is designed primarily to conserve judicial resources by relieving courts of the burden of having to decide for a second time an issue that previously was fully litigated and decided. But the Ninth Circuit's "equivalent determination" doctrine does nothing to further that goal. In every case, it will require a federal court to closely examine state court precedents construing state law takings claims and then decide whether those precedents are sufficiently similar to federal court Takings Clause decision to warrant being deemed "equivalent." There is no net savings in judicial resources; the judicial resources necessary to undertake such detailed comparisons of state and federal law are not appreciably different from the judicial resources necessary to decide a Takings Clause claim on its merits. Under those circumstances, there is simply no sound basis for denying a Takings Clause claimant his day in federal court.

I. Review Is Warranted Because the Ninth Circuit's Decision Conflicts with Other Appeals Court Decisions and Threatens to Prevent Takings Clause Claimants from Ever Having Their Day in Court

The Ninth Circuit held that the doctrine of issue preclusion barred Petitioners from raising their Takings Clause claimants in federal court, even though: (1) Petitioners initially (and properly) filed suit in federal court; (2) Petitioners later filed suit in the California courts, as they were required to do by the federal court; (3) Petitioners made clear at all times in the California court proceedings that they were *not* raising their Takings Clause claims in those proceedings but rather were reserving those claims for later federal court proceedings; and (4) the California courts acknowledged that no federal claims had been raised or were being decided and gave no indication that they believed that California issue preclusion rules would bar a later suit (in either federal or state court) raising Takings Clause claims.

In so ruling, the Ninth Circuit acknowledged that its ruling directly conflicts with the Second Circuit's *Santini* decision. . In *Santini,* property owners alleged that a Connecticut agency had effected a temporary taking of their property by naming the property as a potential site for a disposal facility, thereby rendering the property undevelopable. In order to comply with *Williamson County*'s ripeness requirement, the owners initially sought compensation in state court under state law, but reserved their federal Takings Clause claims for later proceedings. After the state courts denied compensation, the owners sought compensation in federal court under the Takings Clause. The Second Circuit held that neither claim preclusion nor issue preclusion barred the owners from raising their Takings Clause claim. *Santini,* 342 F.3d at 126-130. The court held:

> [W]e deem it appropriate to permit parties like *Santini*, who litigate state-law takings claims in state court involuntarily, to reserve their federal takings claims for determination by a federal court. It would be both ironic and unfair if the very procedures that the Supreme Court [in *Williamson County*] required Santini to follow before bringing a Fifth Amendment takings claim - a state-court inverse condemnation action - also precluded Santini from ever bringing a Fifth Amendment claim.

Id. at 130.

If anything, Petitioners have an even stronger claim to be litigating in federal court because, unlike Santini, they filed a federal court action before being relegated to state court.[7] Yet the Ninth Circuit applied issue preclusion to bar Petitioners' Takings Clause claims, all the while acknowledging that its decision directly conflicts with *Santini*. Pet. App. 14a-15a. Review is warranted to resolve that conflict.

The decision below conflicts with at least one other federal appellate decision. In *Fields v. Sarasota Manatee Airport Authority,* 953 F.2d 1299 (11th Cir. 1992), the Eleventh Circuit held that issue preclusion does not bar property owners from raising a Takings Clause case in federal court -- even though they have already lost a state-law takings claim in state court and even though "the federal takings claim is essentially the same claim as that raised in the Florida law

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[7] Moreover, the Ninth Circuit in *San Remo I* acknowledged that at least a portion of Petitioners' facial Takings Clause challenge was ripe in 1998, *San Remo I,* 145 F.3d at 1102, and thus it is incontestable that Petitioners properly invoked federal court jurisdiction at that time. Adjudication of the ripe portion of Petitioners' Takings Claim was delayed solely because the Ninth Circuit invoked *Pullman* abstention.

inverse condemnation action" -- so long as the owner has explicitly reserved in the state action his right to raise his federal claims in a later federal court action. *Fields*, 953 F.2d at 1308.[8] Although the Ninth Circuit did not cite *Fields*, the district court noted the conflict between *Fields* and the Ninth Circuit's approach. Pet. App. 39a-40a. More recently, the Sixth Circuit noted (without deciding) the split between the Second and Ninth Circuits on this issue. *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004).

In reviewing relevant case law from the federal appeals courts, *DLX* noted one issue on which the federal courts appear to be in complete agreement: *claim preclusion* does not bar filing Takings Clause claims in federal court under the facts of this case. So long as the property owner makes an *England* reservation in state court -- thereby making clear his intent to not to pursue Takings Clause claims in state court but rather to reserve those claims for a later federal court action -- the appeals courts (including the Ninth Circuit) unanimously agree that claim preclusion does not bar the later action. *DLX*, 381 F.3d at 522-23.[9] The correctness of those claim preclusion holdings is not at issue here; the Ninth Circuit explicitly noted that San Francisco "does not dispute that the plaintiffs'

[8] Because the owners had *not* made such a reservation, the Eleventh Circuit held that their claims were barred by *claim* preclusion. *Id.* at 1309.

[9] Conversely, most courts of appeals hold that if a property owner in a state court action fails to reserve his federal claims, assertion of those federal claims in a later action is barred by the doctrine of claim preclusion, which generally bars assertion of a claim in a second action that either was or could have been raise in a first action. *See, e.g., Wilkinson v. Pitkin County Bd. of County Commissioners*, 142 F.3d 1319 (10th Cir. 1998).

England reservation was sufficient to avoid the doctrine of *claim* preclusion." Pet. App. 12a-13a.

But by relying instead on the doctrine of issue preclusion to bar Petitioners' claims, the Ninth Circuit has applied that doctrine in an unprecedented manner, and in a manner that threatens to deprive property owners of all opportunity to raise Takings Clause claims.

The Ninth Circuit was correct in holding that federal constitutional claims brought in federal court are not categorically exempt from application of the issue preclusion doctrine. As the Court explained in *Allen v. McCurry*, 449 U.S. 90, 97-98 (1980):

> [N]othing in the language of [42 U.S.C.] § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion. * * * Section 1983 creates a new federal cause of action. It says nothing about the preclusive effect of state-court judgments.

But the Ninth Circuit read far too much into that decision. *Allen* said merely that the lower court had erred in finding issue preclusion categorically inapplicable to § 1983 claims, and its remand explicitly refrained from deciding whether issue preclusion applied in that case or any other specific case. *Id.* at 95 n.7 ("It must be emphasized that the question whether any exceptions or qualifications within the bounds of that doctrine might ultimately defeat a collateral estoppel defense in this case is not before us."). One exception/qualification explicitly cited by *Allen* is highly pertinent to this case:

> In the event that a § 1983 plaintiff's federal and state-law claims are sufficiently intertwined that that the federal court abstains from passing on the federal claims without first allowing the state court to address the state-law issues, the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court.

Id. at 85 n.7 (citing *England,* 375 U.S. 411). Yet, the Ninth Circuit held that issue preclusion required dismissal of Petitioners' claims, despite: their initial filing in federal court; *San Remo I*'s invocation of *Pullman* abstention to send Petitioners to state court; and Petitioners' subsequent assertion of an *England* reservation before the California courts.

Moreover, the Ninth Circuit invoked issue preclusion to bar categorically any consideration of the Takings Clause claim, not merely to bar relitigation of specific factual issues decided in an earlier proceeding. The Ninth Circuit invoked issue preclusion in that latter, more limited context in *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir.) ("*Dodd II*"), *cert. denied,* 525 U.S. 923 (1998), an earlier Takings Clause case. *Dodd II* held that the Oregon Supreme Court's factual determination that the landowners retained significant residual value in their property even after new zoning rules were imposed precluded the landowners from seeking to relitigate that factual issue in federal court. *Dodd II*, 136 F.3d at 1227. But *Dodd II* declined an invitation to invoke issue preclusion to bar the landowners' Takings Clause claim based solely on the Oregon courts' denial of the landowners' analogous state-law takings claims; rather, it addressed the Takings Clause claim on the merits. *Id.* at 1229-30. The Ninth Circuit in the decision below went far beyond anything required by *Dodd II*

when it applied issue preclusion to bar all consideration of Petitioners' Takings Clause claims.[10]

That wildly expansive interpretation of issue preclusion is particularly troubling because it cuts against a basic principle undergirding *England*: in general, those asserting federal constitutional rights ought to have an opportunity to press those claims in a federal forum. *See, e.g., England*, 375 U.S. at 415 ("There are fundamental objections to any conclusion that a litigant who has invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without consent and through no fault of his own, to accept instead a state court's determination of those claims."). *See also Mitchum v. Foster,* 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of state law.").

Furthermore, the result of the Ninth Circuit's decision is to preclude direct consideration of Takings Clause claims *even in state court*, both in California and in the many other states that deem Takings Clause claims unripe in state court until after a landowner has been denied relief under state-law takings claims. *See Breneric Associates v. City of Del Mar*, 69 Cal. App. 4th 166, 188 (1998) (citing *Williamsburg County*, court holds that Takings Clause claim was unripe because state

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[10] *Cf. DLX*, 381 F.3d at 523 (Sixth Circuit declines to decide whether *Santini* is correct that issue preclusion is *never* applicable under these circumstances, but nonetheless holds that state court judgment denying state takings claims did *not* collaterally estop plaintiffs from raising Takings Clause claims in federal court, because none of *the factual issues* directly decided in the state court proceedings were relevant to the Takings Clause claims.).

courts had not yet denied landowners' state-law claims for just compensation). If the Ninth Circuit's view of issue preclusion is correct, then once such state-law claims have been denied by the state courts, landowners would be barred from raising their Takings Clause claims even in California courts. It was precisely such concerns that led the Second Circuit in *Santini* to find issue preclusion inapplicable under these circumstances. *Santini*, 342 F.3d at 128-130.[11]

In sum, review is warranted because the decision below conflicts with decisions of the Second and Eleventh Circuits and threatens to prevent Takings Clause claimants from ever having their day in federal court, or even in a state court.

II. Review Is Warranted on the Ninth Circuit's Application of Issue Preclusion, Regardless Whether the Court Is Inclined to Review the Second Issue

Amici believe that review is warranted on both issues raised by the Petition. Nonetheless, resolution of the first issue in Petitioners' favor is in no way dependent on their prevailing on the second issue. Regardless whether the Court is inclined to grant review on the second issue, it should grant review on the first issue. Unless reversed, the Ninth Circuit's breathtakingly expansive interpretation of the issue preclusion doctrine will apply to *all* Ninth Circuit litigants raising Takings Clause claims, not simply those seeking *Nollan/Dolan*

[11] *Santini* involved landowners who had litigated a state-law action in state court in Connecticut before filing a Takings Clause action in federal court. Similar to the California courts, the Connecticut courts do not permit landowners to raise Takings Clause claims in state court until after they have litigated and lost a claim for compensation under state law. *Melillo v. City of New Haven*, 249 Conn. 138, 154 n.28 (1999) (cited by *Santini*, 342 F.3d at 127).

review of exactions imposed as a condition for approval of property development.

Petitioners contend (in connection with the second issue presented) that the federal courts should have applied the *Nollan/Dolan* "rough proportionality" test to the exaction imposed upon them. But more fundamentally, Petitioners contend that the courts below erred in refusing to consider the merits of their Takings Clause claims. Regardless of what level of scrutiny the federal courts apply to those claims, Petitioners most basic desire is that the federal courts at least consider those claims on their merits.

The California Supreme Court decision well illustrates that Petitioners have substantial arguments that their Fifth Amendment rights were violated, even if the Ninth Circuit were correct (which it is not) that the *Nollan/Dolan* rough proportionality test is inapplicable. For example, Justice Baxter (joined by Justice Chin) agreed with the majority that state takings law did not require that anything akin to the "rough proportionality" test be applied to the exaction imposed on Petitioners. Pet. App. 164a. They nonetheless dissented from the dismissal of Petitioners' takings claims because in their view, if the facts were as alleged by Petitioners, the exaction imposed on Petitioners was unconstitutionally excessive even under the "reasonable relationship" test that they proposed. *Id.* at 168a-174a. Similarly, as Justice Brown articulated in her dissent, there is a strong argument that the decision-making process by which San Francisco imposed a $567,000 exaction on Petitioners was adjudicative in nature, not legislative. *Id.* at 180a. Justice Brown's dissent thus demonstrates that, even under the Ninth Circuit's view of *Nollan/Dolan*, there is a strong argument to be made that *Nollan/Dolan*'s "rough proportionality" test should be applied to the exaction imposed on Petitioners.

But, of course, Petitioners were never permitted to make those arguments to the Ninth Circuit. Instead, the court dismissed this case under the issue preclusion doctrine without ever reaching the merits of Petitioners' Takings Clause claims. Review of Issue One is warranted to determine whether the Ninth Circuit properly precluded consideration of those claims, without regard to the legal standards ultimately applied to those claims.

III. Review Is Warranted Because the Ninth Circuit's Decision Is So at Odds With This Court's Issue Preclusion Precedents

Review is also warranted because the Ninth Circuit's decision is so clearly at odds with this Court's issue preclusion precedents. Those precedents indicate that issue preclusion serves to bar litigation of an issue only when the *precise* issue has already been decided in a prior proceeding. Yet, the Ninth Circuit invoked issue preclusion here even though there is no dispute that *none* of the federal Takings Clause issues raised by Petitioners in their federal court proceedings were ever precisely raised or decided by the California courts.

This Court has explained that "under collateral estoppel [issue preclusion], once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior action." *Montana v. United States*, 440 U.S. 147, 153 (1979). The Court has not hesitated to deny application of issue preclusion where an issue was not "actually" and "necessarily" determined in the prior proceeding. *Haring v. Prosise*, 462 U.S. 306, 316 (1983). Moreover, issue preclusion doctrine is applicable *only* "when the question upon which the recovery of the second demand depends has under *identical*

circumstances and conditions been previously concluded by a judgment" in prior proceedings. *United States v. Moser*, 266 U.S. 236, 241-42 (1924) (emphasis added).

The Ninth Circuit did not assert that the issues whose litigation it precluded had actually been determined in a prior proceeding. Instead, it held merely that the California Supreme Court's determination of the state-law takings claims was "an equivalent determination" of Petitioners' federal Takings Clause claims. Pet. App. 17a. There is no basis under state or federal law for precluding review of a federal issue simply because a previously decided state-law issue is deemed in some sense to be "equivalent."

Indeed, the Ninth Circuit did not cite any California case law in support of its "equivalent determination" standard.[12] Instead, it borrowed that language from a previous Ninth Circuit decision, *Dodd v. Hood River County*, 59 F.3d 852, 863 (1995) ("*Dodd I*"). But *Dodd I* cited no precedent for its "equivalent determination" language, and certainly none deriving from either California law or the law of Oregon (the state from which *Dodd I* arose). It appears that the Ninth Circuit, rather than looking to applicable state law to determine the scope of issue preclusion, has simply crafted its own circuit-wide issue preclusion rule that has the effect of preventing Takings Clause claimants from ever bringing their claims into federal court.

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[12] The only California decision cited by the Ninth Circuit regarding when California courts apply issue preclusion is *Stolz v. Bank of America*, 15 Cal. App. 4th 217, 222 (1993). But as the Ninth Circuit conceded, *Stolz* held that issue preclusion applies only when the issue decided in the prior proceeding is "identical" to the issue arising in the later proceeding. Pet. App. 15a.

The Ninth Circuit issue preclusion rule not only is contrary to precedent, but does not appear to serve any of the purposes for which courts have crafted the issue preclusion doctrine. Claim and issue preclusion are intended to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication." *Allen,* 449 U.S. at 94. The Ninth Circuit "equivalent determination" rule does nothing to prevent "inconsistent decisions," because there is no necessary inconsistency between a finding that a state has not violated state takings law and a later finding that the same state action violated the federal Takings Clause. Nor does the rule "conserve judicial resources." In every case, the "equivalent determination" rule will require a federal court to examine closely state court precedents construing state law takings claims and then decide whether those precedents are sufficiently similar to federal court Takings Clause decision to warrant being deemed "equivalent." There is no net savings in judicial resources; the judicial resources necessary to undertake such detailed comparisons of state and federal law are not appreciably different from the judicial resources necessary to decide a Takings Clause claim on its merits. Under those circumstances, there is simply no sound basis for denying a Takings Clause claimant his day in federal court.

In sum, review is warranted because the issue preclusion rule established by the Ninth Circuit is inconsistent with this Court's precedents, does not appear to derive from the issue preclusion rules of any state, and does not serve any of the purposes underlying issue preclusion doctrine.

CONCLUSION

Amici curiae request that the Court grant the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states, including many in the State of California. WLF has appeared before this Court in numerous cases involving claims arising under the Fifth Amendment's Takings Clause. *See, e.g., Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *McQueen v. South Carolina Coastal Council*, 354 S.C. 142, *cert. denied*, 124 S. Ct. 466 (2003). WLF filed a brief in this case when it was before the California Supreme Court.

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and professional organizations of every size, in every sector of business, and from every region of the country, and has several thousand members in California. An important function of the Chamber is to represent the interests of its members in court on issues of national concern to the business community.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The American Association of Small Property Owners (AASPO) is a nonpartisan, nonprofit § 501(c)(3) corporation. Since 1993, AASPO has been working for the right of small property owners to prosper freely and fairly -- to make possible the American dream of building wealth though real

estate. Based in Washington, DC, AASPO has chapters or affiliates in more than 25 states.

The National Taxpayers Union (NTU) is a nonprofit citizen group founded in 1969 to work for lower taxes, smaller government, and more accountability from elected officials. Headquartered in Alexandria, Virginia, NTU has 350,000 members nationwide.

Anthony Palazzolo is a Rhode Island property owner. He was the petitioner in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), a case that decided important issues under the Fifth Amendment's Takings Clause. He believes that the hostile treatment his Takings Clause claims received in Rhode Island state courts well illustrates the need to preserve a federal forum in which such claims can be raised.

The Property Rights Foundation of America, Inc. (PRFA) is a nonprofit organization based in New York State and dedicated to providing information and education and promoting understanding about the fundamental constitutional rights of America's citizens, especially the right to own and use private property. PRFA is a volunteer, grass-roots organization committed to assisting citizens, policy-makers, and those in the media concerned with protecting the rights of property owners against government abuse.

The South Carolina Landowners Association, Inc. (SCLA) is a statewide nonprofit grassroots organization dedicated solely to the promotion and protection of property rights through research, analysis, and education. SCLA joins this brief because it maintains that a property owner should not be barred from raising Fifth Amendment Takings Clause claims solely because similar claims under state law have been previously rejected.